We believe, however, that a sixty day time frame is too long. Our rule will not, we emphasize, prohibit leased access users from providing earlier notification, especially if they wish their programming to be published in monthly viewer guides that cable operators provide to their subscribers. Moreover, we are aware that a specific time slot requested may not be available and, therefore, alternative air dates or arrangements may have to be made. In such circumstances, no further notification from the program provider shall be required. We decline to adopt Time's suggestion that notification should be made at the time of contracting since that proposal may unreasonably hamper the flexibility of program providers committed to leased access use over extended periods of time. For the present, a thirty day prior notice requirement seems reasonable. If we later find that this approach is too burdensome for either program providers or cable operators, we can alter it accordingly.

3. Record Retention Requirements

57. We sought comment in our Notice on whether "a cable operator should be required to retain notifications for a prescribed period of time."

58. Blade Communications argues that cable operators should not be required to retain notifications any longer than the applicable statute of limitations. Cox Cable, however, argues that notifications should not be kept any longer than three or four months while NCTA argues that there should be a short retention period as well as short period for filing complaints under section 612, as amended under the new Cable Act, which provides procedures for expediting disputes relating to leased access. Time argues for an eighteen month period which it states is consistent with other record retention requirements, e.g., section 76.225(c) relating to recordkeeping for commercial limits in children's programs. New York State points out that it requires the entity administering its other access channels to retain records for a two-year period.

Discussion

59. We shall require cable operators, consistent with our other cable recordkeeping requirements, to retain copies of program provider identifications and/or certifications for eighteen months from the date of receipt. This will ensure that such information will be available should any disputes arise under section 10(b) or related leased access provisions. As mentioned earlier, the notification or certification shall apply to the leased access user but need not specifically mention each program as long as the access user's notification or certification covers all of the programming intended to be carried on commercial leased access. Program providers will also be required to renew their certifications prior to the expiration of the eighteen month period for programming intended to be shown after that date.

E. Blocked Indecent Leased Access Programs

1. Blocking Mechanisms and Subscriber Access

60. As noted above, section 10(b) specifically requires cable operators to place all indecent programming on a single leased access channel and to block access to that channel unless the subscriber requests access in writing. In the Notice, we stated that "[o]ur proposed regulations would codify these statutory requirements" by requiring cable operators to place such programming "on a single leased access channel, employ appropriate blocking mechanisms, and permit access only if the subscriber so requests in writing." We specifically asked commenters for relevant suggestions or comments "concerning appropriate blocking mechanisms and procedures relating to subscriber access."

61. Cable operators are almost unanimous in holding that the Commission should not prescribe a required method of blocking but should allow maximum flexibility as long as it is effective. Such methods should include scrambling, interdiction (by positive or negative traps), or lockboxes. In addition, Cox Cable states that the cable operator should not have to provide more than one blocked channel. In the same vein, Acton maintains that cable operators should be able to deny carriage if the blocked channel is full, while Time states that the cable operator should be allowed to provide more than one blocked channel if it chooses.

62. MPAA argues, in reply comments, that the Commission should take an expansive view of the "single" channel requirement by not limiting it to a 6 MHz channel standard but should interpret the statute to allow cable operators to provide such programming on multiple compressed channels. Acton also argues that the blocked channel obligation should only arise if an operator chooses to carry indecent leased access programming. TCI maintains that the cable operator should not be required to set aside a channel in advance. Acton also maintains that programmers offering indecent programming should not have a right to insist on the blocked channel option.

63. Acton further states that cable operators should not be required to block the channel on a twenty-four hour per day basis. Many other cable operators similarly state that they should not be required to block more channel capacity than necessary, i.e., the rest of the blocked channel should not be "warehoused" for indecent programming. For example, Continental Cablevision says that many cable systems cannot afford to devote two channels for leased access programming that would otherwise fit on a single leased access channel. It further states that cable operators should be allowed to aggregate and scramble all indecent leased access programming on a single channel. Time argues that, in addition to being allowed to block only during indecent programming, cable

operators should be able to limit periods for indecent programming and to choose time slots, and that programmers should not be permitted to change their minds during the contract period requiring channel placement changes. Cox Cable argues that cable operators should not be required, as part of the blocking obligations, to market blocked programming.

64. As for subscriber access, TCI says that the FCC should allow the cable operator to use any reasonable method to notify subscribers about the blocked channel. NCTA believes that subscribers should have sufficient time to request access to that channel in writing and that cable operators should have additional time to unblock that channel for interested subscribers. It therefore states that cable operators should have sixty days to notify subscribers (as well as to establish the channel) from an initial request for airing indecent leased access programming and, thereafter, a minimum of thirty days' notice to satisfy requests for blocking of service. Alliance maintains that subscribers should be able to request unblocking of a blocked channel by telephone after the subscriber has mailed the cable operator a written request and that the Commission should prescribe the form of the request and ensure that the cable operator protects the subscriber's privacy.

Discussion

65. We shall allow cable operators to employ any blocking mechanism that they choose -- scrambling, interdiction or any other method, as long as it is effective.[46] We agree that cable operators should not be required to block a leased access channel to be used for carriage of indecent leased access programming until they receive a request for carriage from a provider of indecent programming.[47] Similarly, cable operators should be allowed to use

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[46] We have already addressed in paras. 12-17, supra, the mandatory "blocking" approach versus section 624's voluntary "lockbox" approach. Nevertheless, we think it would be permissible to place all indecent leased access programming on a single channel and use lockboxes as a blocking mechanism, so long as the blocking is accomplished in a non-voluntary manner such that access to the channel is precluded unless and until subscribers request access in writing. We believe this approach would satisfy the plain language of the statute (requiring subscribers to gain access by making requests in writing) and the statute's clear intent that cable operators, not subscribers, be responsible for initial blocking.

[47] As discussed below, however, operators must have the capability to block such a channel within the implementation time frame specified in our rules.

the channel for other non-blocked leased access programming to the extent it is not being used for indecent programming.[48] Thus, we will require that the channel be blocked only during those time periods that indecent leased access programming is being shown.

66. We disagree with those commenters who suggest that cable operators should be permitted, on blocked channels, the additional flexibility to "channel" such programming by scheduling it only at late hours of the evening or other times when children are least likely to be viewing. As we stated in the Notice, "[i]nstead of this type of 'safe harbor' approach" that has been applied to broadcasting, Congress appears to have "deliberately chosen" a 'blocking' approach, similar to that under section 223 for indecent telephonic communications.[49] We do agree with Time that cable operators should be permitted, if they so choose, to provide an additional blocked leased access channel for indecent programming if the first channel becomes full.[50]

67. We decline to specify the form of notification about the availability of a blocked channel that cable operators should give to subscribers but we shall require that the subscriber's written request to receive the channel contain a statement that the subscriber is at least eighteen years of age. Cable operators will be required to "unblock" the channel within thirty days after receipt of a written subscriber request. Because it appears contrary to statutory intent, we decline to adopt Alliance's suggestion that "unblocking" should be permitted by telephone call if the subscriber has notified the cable operator in writing to activate his or her ability to have the block lifted. We believe that mere telephonic confirmation is insufficient to ascertain that the recipient is, in fact, at least eighteen years of age.

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[48] As suggested by one commenter, the "blocked" channel shall be counted as part of the cable operator's obligation to provide leased access capacity under section 612, as amended by the new Cable Act.

[49] However, as previously indicated, supra note 39, we believe that cable oprators with written and published policies issued pursuant to section 10(a) have authority under that section to block indecent programming and to schedule it as they please on blocked channels.

[50] We decline to address at this time whether operators that do not have a written and published policy under section 10(a) might be required to provide an additional blocked channel in the event a single channel is filled. If and when that circumstance arises, we can examine that question in a concrete factual setting.

2. Time Period for Implementation

68. We did not specify or recommend in the Notice a specific time frame by which cable operators would be required to implement the blocking and associated requirements of section 10(b). Most cable operators argue that a time frame of 180 days following adoption of final FCC rules should be set to allow cable operators sufficient lead time to equip themselves and their customers in order to comply with the new requirements. Additionally, Time advocates that non-addressable cable systems be allowed ten years if they use lockboxes. Cox Cable urges cable operator compliance within 180 days following receipt of a first notification of request for carriage of indecent leased access programming. TCI states that cable operators should be afforded a reasonable time to comply but does not specify a particular time frame. Alliance argues that cable operators will need at least 120 days before they can implement the Commission's final rule but that the Commission should clarify that, during the interim period, the provisions of section 10 are to be stayed. MPAA states that an acceptable time frame for implementation would be 120-180 days from the date the final rules become effective.

Discussion

69. We are aware that implementation of the new blocking requirements may be difficult for some cable systems that are not as technologically advanced as addressable systems and that the new requirement may require considerable adjustments by some cable systems in terms of rearranging existing services to accommodate a single leased access channel of indecent programming. In addition, the new regulations will require cable operators to establish and administer new procedures for subscriber notification of the availability of this new channel and for the processing of requests of leased access users and of subscriber requests for this channel, etc. We are also aware of the efforts that may be involved for those systems that require trapping devices to circumscribe access to these services.

70. In view of the foregoing considerations, we will require that cable operators have in place blocking implementation mechanisms and procedures within 120 days of the date of publication of the new regulations in the Federal Register so that thereafter they will not carry programming identified as indecent on non-blocked channels and will be able to accommodate any request for carriage of indecent programming on a blocked leased access channel within 30 days after its receipt. The 120 day period should provide cable operators sufficient time within which to make technical arrangements, inform subscribers of the new leased access blocking requirement and afford subscribers adequate time to notify the cable operator in writing if they wish to receive any programming on the channel when, and if, it becomes available on

the system.[51]

71. This, or similar measures taken during the transition period,[52] should also enable cable operators to approximate the number of subscribers initially interested in receiving the channel, which should assist in technical implementation of the blocked channel. At the expiration of the 120 day period, cable operators subject to section 10(b) will be required to place indecent programming on a blocked channel. This means that, no later than 30 days prior to the expiration of the 120 day period, programmers must identify any programming that is indecent and which is intended to be carried on the 121st day of the time period.

72. We believe that these time frames are reasonable and are generally consonant with the time frame requested by most of the parties in their comments. We note that cable operators have been on notice of the statute's requirement since the date of enactment of the new Cable Act, October 5, 1992. We further note that many cable systems have existing technology in place in various degrees for use in providing other services that can be adapted toward fulfilling these requirements. Thus, even though the implementation period may not be as long as many cable operators would prefer, we believe it is sufficient.

VI. Resolution of Disputes under Sections 10(b)

73. There was a broad range of comment over the forum and the manner in which disputes relating to indecent programming on leased access channels should be handled. Some comments specifically addressed procedures for the leased access channels while other comments, particularly from access groups, were directed solely at

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[51] As we noted earlier, subscribers should notify the cable operator in writing at least 30 days prior to the date they wish to receive the service and the notification should include a statement that the subscriber is at least eighteen years of age.

[52] Unless cable operators have a written and established policy of prohibiting indecent leased access programs adopted under section 10(a) of the new Cable Act, they will not be permitted to prohibit indecent programming on the leased access channels during the transition period to the blocking approach. We decline to stay the provisions of section 10(a), as requested by Alliance, because we are not empowered to stay statutory provisions and, moreover, both section 10(a) and section 10(d) are self-executing provisions that became effective 60 days after enactment of the new Cable Act on October 5, 1992. We also shall not stay the effectiveness of the new rules adopted under section 10(b) pending court review, as requested by Alliance.

the public, educational, and leased access channels on cable systems.[53] Time suggested that such disputes should be resolved locally, preferably in court, while others, such as Cox Cable, contend that the Commission is the proper forum for resolution of disputes. NCTA and others suggest that the Commission should adopt expedited resolution procedures consonant with the new provision in amended section 612 (c)(4)(iii) that requires establishment of "procedures for the expedited resolution of disputes concerning rates or carriage under this section." Intermedia argues that the Commission should exercise exclusive jurisdiction, particularly over prior restraint issues and disputes.

74. Denver Access maintains that disputes should be appealable to the Commission or another neutral adjudicator. NATOA maintains that disputes should be resolved by the courts because ultimately, they must decide the constitutional issues. Alliance maintains that without procedural safeguards applicable to prior restraints on speech, the statute and implementing regulations cannot withstand constitutional scrutiny.

Discussion

75. We do not envision disputes arising from the content of programs on the leased access channel except where a program, not identified by a program provider as indecent, is carried on a non-blocked leased channel, and is alleged to be indecent. In view of the fact that Congress explicitly required us to adopt regulations implementing section 10(b), we believe that, in such instances, we are obligated to specify procedures for resolution of disputes relating to section 10(b)'s implementation. Therefore, where such disputes arise (e.g., there is an allegation that a program provider failed to comply with the new program identification rules), we will entertain special relief petitions under section 76.7 of our rules, 47 C.F.R. §76.7, from cable operators in accordance with the existing procedures we have established.[54]

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[53] As noted previously, that part of this rule making addressing restrictions on the public, educational, and leased access channel will be addressed at a later date in a separate Report and Order. Accordingly, those comments will be considered therein.

[54] Congress, in section 9 of the new Cable Act, requires us to "establish procedures for the expedited resolution of disputes concerning rates or carriage under this section." We believe that Congress intended by this provision to ensure that the rights of leased access users to carriage or reasonable rates under section 612 of the Communications Act would not be unduly prejudiced pending resolution of such disputes. To the extent that the existing carriage rights of access users may be affected in the

Similarly, we will entertain complaints from subscribers in accordance with our existing complaint procedures. If the petition or complaint is meritorious, we will then take appropriate action, based upon the circumstances, e.g., issue a warning or a notice of apparent liability for violation of the statute and/or Commission rules, or denial of leased access to a program provider in the future.[55]

VII. Final Regulatory Analysis Statement

76. The Need and Purpose of this Action. The regulations in this First Report and Order are intended to implement that part of Section 10 of the Cable Consumer Protection and Competition Act of 1992 that directs the Commission to adopt regulations designed to limit children's access to indecent programming on commercial leased access channels. The regulations accomplish this by requiring cable operators (which do not voluntarily prohibit indecent programming) to place indecent programming, as identified by program providers, on a "blocked" leased access channel and restricting subscriber access to this channel unless specifically requested in writing by a subscriber.

77. Summary of Issues Raised By the Public Comments in Response to the Initial Regulatory Flexibility Analysis. Boston Community Access commented on the failure of the initial analysis to mention the far greater burdens that would be imposed on nonprofit access organizations, institutional access producers, and individual access producers, not merely the new burdens that would be placed on cable operators. Although others pointed out the burdens that would be imposed on access administrators, access users, and others, their comments were not specifically directed to the Initial Regulatory Flexibility Analysis.

78. Significant Alternatives Considered and Rejected. In this First Report and Order, we have considered the most efficacious manner to implement the section 10's provisions relating to indecent programming on leased access channels and in the least burdensome manner that is consistent with the statute's aims. To the extent that Boston Community Access' comments, noted

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interim pending resolution of a dispute under section 10(b) of the new Cable Act, we will apply these expedited procedures.

[55] To the extent other disputes arise between the cable operator and program provider, they can also be handled, as appropriate, under the special relief provisions of section 76.7 of our rules, 47 C.F.R. §76.7, particularly where they involve other provisions of amended section 612 of the Act relating to rates, terms, and conditions of leased access use.

above, are directed to adoption of restrictions relating to the public, educational, and governmental access channels, they will be addressed in a subsequent Report and Order. To the extent they are intended to address leased access channel restrictions, we have attempted to minimize the burdens on leased access program providers by not requiring notification as to each individual program provided by them and by requring such notifications only by those responsible for the content of the programming. No other significant alternatives consistent with the aims of the statute were presented.

VIII. Conclusion

79. Our purpose has been to implement the provisions of section 10(b) which, in accordance with the will of Congress, are intended to safeguard the well-being of children in our society, a compelling governmental interest, by reducing their exposure to indecent programming on commercial leased access channels. By the same token, we have sought to protect the constitutionally protected rights of others to distribute, and receive access to, such programming on cable television. We believe that the regulations we have adopted strike an appropriate balance between these aims.

IX. Ordering Clauses

80. Accordingly, pursuant to section 10 of the Cable Consumer Protection and Competition Act of 1992, Pub. L. 102-385, and sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, Part 76 of the Commission's Rules IS AMENDED, as set forth in Appendix A below, effective 120 days from the date of publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Donna R. Searcy
Secretary

APPENDIX A

AMENDATORY TEXT

PART 76 -- CABLE TELEVISION SERVICE [AMENDED]

1. The authority citation of Part 76 is amended to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Sec. 612, as amended, 106 Stat. §1460, 47 U.S.C. §532

2. Part 76 is amended by adding the following subpart:

Subpart L -- Cable Television Access

§76.701 Leased Access Channels

(a) Notwithstanding 47 U.S.C. §532(b)(2) (Communications Act of 1934, as amended, Section 612), a cable operator, in accordance with 47 U.S.C. § 532(h) (Cable Consumer Protection and Competition Act of 1992, §10(a)), may adopt and enforce prospectively a written and published policy of prohibiting programming which, it reasonably believes, describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.

(b) A cable operator that does not prohibit the distribution of programming in accordance with paragraph (a) shall place any leased access programming identified by program providers as indecent on one or more channels that are available to subscribers only with their prior written consent as provided in paragraph (c).

(c) A cable operator shall make such programming available to a subscriber within 30 days of receipt of a written request for access to the programming that includes a statement that the requesting subscriber is at least eighteen years old; a cable operator shall terminate a subscriber's access to such programming within 30 days from receipt of a subscriber's request.

(d) A program provider requesting access on a leased access channel shall identify for a cable operator any programming that is indecent as defined in paragraph (g). Such identification shall be in writing and include the full name, address, and telephone number of the program provider and a statement that the program provider is responsible for the content of the programming. A cable operator may require that such identification be provided up to 30 days prior to the requested date for carriage. A program provider requesting carriage of "live programming" on a leased

access channel that is not identified as indecent must exercise reasonable efforts to insure that indecent programming will not be presented. A cable operator will not be in violation of paragraph (b) if it fails to block indecent programming that is not identified by a program provider as required in paragraph (d).

(e) A cable operator may request a program provider to certify that the programming intended for leased access is not obscene programming or indecent programming subject to the requirement of paragraph (b). A cable operator may request a program provider of "live programming" to certify that reasonable efforts will be made to ensure that such programming is not obscene programming or indecent programming subject to the requirement of paragraph (b).

(f) A cable operator shall not be required to provide leased access to a program provider if --

(1) the program provider refuses to identify whether programming is indecent as required under paragraph (d); or

(2) the program provider refuses or fails to certify, if requested by the cable operator under paragragh (e), that the programming is not obscene programming or indecent programming subject to the requirement of paragraph (b); or

(3) the program provider refuses or fails to certify, if requested by the cable operator under paragraph (e), that reasonable efforts will be made to ensure that any "live programming" is not obscene programming or indecent programming subject to the requirement of paragraph (b); or

(4) the program provider has failed to provide up to thirty days prior notice, if requested by the cable operator, that the programming is indecent.

(g) For purposes of paragraphs (b)-(f), "indecent programming" is any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium.

(h) Cable operators shall retain records sufficient to verify their compliance with paragraph (b) of this section and make such records available to the public. Such records must be retained for a period sufficient to cover the limitations period specified in 47 U.S.C.§503(b)(6)(B).

3. Section 76.305(a) is amended by deleting the word "and" before "§76.225(c)" and deleting the period at the end of that paragraph and inserting "and §76.701(h) (records for leased access)."

APPENDIX B

COMMENTS

Acton Corp., Allen's Television Cable Service, Inc., Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Helicon Corp., Jones Intercable, Inc., KBLCOM, Inc., Monmouth Cablevision Assoc., TeleCable Corporation, Texas Cable TV Association, United Video Cablevision, Inc., West Virginia Cable Television Association ("Acton")

Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way (jointly) ("Alliance")

Ann Arbor Community Access Television

Arizona Cable Television Association*

Baratta, Mark Conrad*

Biddeford Public Access Corp.*

Blade Communications, Inc.; Multivision Cable TV Corp.; Parcable, Inc.; Providence Journal Company; and Sammons Communications, Inc. (jointly) ("Blade Communications')

Bogue, Virginia B. and Amy Lorum*

Boston Community Access and Programming Foundation ("Boston Community Access")

Capital Community Television, Salem, Oregon

City of Austin, Texas*

City of Cleveland Heights*

City of San Antonio, Texas

City of Santa Barbara*

City of Tampa, Florida

Cole, Roxie, Lee

Columbus Community Cable Access, Inc.

Community Access Network, Incorporated

Community Antenna Television Association, Inc. ("CATA")

Continental Cablevision, Inc. ("Continental Cablevision")

Cox Cable Communications ("Cox Cable")

Crandall, Judy

Defiance Community Television

Denver Area Educational Telecommunications Consortium, Inc. ("Denver Access")

Dreety, David B.

Fortriede, Steven C., Associate Director, Allen County Public Library, Fort Wayne, Indiana

Hillsborough County Board of County Commissioners

Hudson Community Access Television*

Inter-Comm Network

Intermedia Partners ("Intermedia")

Manhattan Neighborhood Network

Metropolitan Area Communications Commission*

Multnomah Community Television

National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors and the National Association of Counties ("NATOA")
National Cable Television Association, Inc. ("NCTA")
Nationwide Communications Inc. ("Nationwide Communications")
Neuman-Scott, Mark*
Nutmeg Public Access Television, Inc.
Rhoda, Carolyn*
Seffren, David A.*
Tele-Communications, Inc. ("TCI")
Time Warner Entertainment Company, L.P. ("Time")
Visser, Randy, Director SPTV
Waycross Community Television

REPLY COMMENTS

Acton Corp., Allen's Television Cable Service, Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Greater Media, Inc., Helicon Corp., Jones Intercable, Inc., KBLCOM Inc., Monmouth Cablevision Assoc., TeleCable Corporation, Texas Cable TV Association, United Video Cablevision, Inc., West Virginia Cable Television Association, Western Communications, Inc. ("Acton")
Alliance for Community Media, The Alliance for Communications Democracy, The American Civil Liberties Union and People for the American Way ("Alliance")
Austin Community Television, Inc.
Baus, Janet
Cambridge Community Television
Channon, David
Cincinnati Community Video, Inc.
City of Austin, Texas
City of St. Paul
Columbus Community Cable Access, Inc.
Community Antenna Television Association, Inc.
Denver Area Educational Telecommunications Consortium, Inc. ("Denver Access")
Friendly, Joe
Malden Access Television*
Mollberg, Erik S.
Motion Picture Association of America, Inc. ("MPAA")
Multnomah Community Television
National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conferene of Mayors, and the National Association of Counties ("NATOA")
National Cable Television Association ("NCTA")
New York Citizens Committee For Responsible Media*
Northrup, Dan
Nunez, Fred
Olelo: The Corporation

Staten Island Community Television
Tele-Communications, Inc. ("TCI")
Time Warner Entertainment Company, L.P. ("Time")
Tucson Community Cable Corporation
Tsuno, Keiko
Viacom International Inc. ("Viacom")
Vitiello, Marisa
Waycross Community Television
Wyrod, Robert

* Informal comment or informal reply comment